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No. 04-1181

In The
Supreme Court of the United States

COASTAL SALVADORAN POWER LTD., COASTAL NEJAPA LTD., EL PASO CGP CO., SUCCESSOR IN INTEREST TO COASTAL STATES GAS CORP. AND THE COASTAL CORP., AND EL PASO CORP., SUCCESSOR IN INTEREST TO COASTAL STATES GAS CORP. AND THE COASTAL CORP.,

Petitioners,

v.

CRYSTAL POWER COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has Congress provided a clear statutory command that remand orders in cases removed pursuant to 9 U.S.C. §205 should be appealable?

2. Was the district court's remand of this case for lack of subject matter jurisdiction based on 28 U.S.C. §1447(c) which requires that a case be remanded "if it appears that the district court lacks subject-matter jurisdiction"?

3. Are the district court's remand orders appealable collateral orders?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent Crystal Power Company ("Crystal Power") files this its Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners Coastal Salvadoran Power Ltd. ("Coastal Salvadoran"), Coastal Nejapa Ltd. ("Coastal Nejapa"), El Paso CGP and El Paso Corporation. For the reasons set forth below, Crystal Power prays that the petition for certiorari be denied.

STATEMENT OF THE CASE

This is a commercial dispute arising from certain agreements between Crystal Power and the Petitioners. None of these agreements contain arbitration provisions, and Crystal Power and Petitioners have never been parties to an arbitration proceeding. Thus, contrary to the statement in the Petition for Writ of Certiorari (Petition for Cert. 3), this suit is not an attack on a final arbitral award or the process that produced that award. Instead, it is a suit among the owners of Coastal Nejapa Co. regarding the distribution of revenue to and through Coastal Nejapa. While the revenue at issue includes the proceeds of an international arbitral award, this suit does not and has never sought to change the terms of that award or block enforcement of the award as between the parties to it.

The agreements made the basis of this suit were between Crystal Power and Petitioner Coastal Salvadoran. These agreements contained no arbitration provisions and instead contained a forum selection clause which allowed suit to be filed in certain enumerated federal courts or in

any state court in New York or Texas. Pursuant to this provision, Crystal Power filed this case in Brazoria County, Texas in October 2002. In June 2003, Petitioners removed this case pursuant to 9 U.S.C. §205 ("Section 205"), claiming that the case was related to an arbitration award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention").

United States District Judge Ewing Werlein, Jr. granted Crystal Power's motion for remand. In finding that the case was not related to an arbitration award for jurisdictional purposes, Judge Werlein correctly noted that the parties to the arbitration proceeding were not parties to this case, that the arbitration was completed, and that the arbitral award was paid. (Memorandum and Order dated November 13, 2003, Appendix B to Petition for Cert. at 8a).[1] Defendants appealed Judge Werlein's remand order to the Fifth Circuit Court of Appeals, in Cause No. 03-21232, and that court dismissed the appeal for lack of jurisdiction on June 1, 2004. (Appendix A). Defendants filed a petition for rehearing *en banc*, and that petition was denied October 18, 2004. (Appendix D).

In addition to appealing Judge Werlein's remand order, Defendants immediately removed the case again to the United States District Court for the Southern District of Texas. As a basis for their second removal, Defendants asserted that this case was related to an arbitration agreement governed by the Convention. On August 18,

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[1] All references herein to appendices are to the appendices attached to Petitioners' Petition for Writ of Certiorari. Such appendices will accordingly be cited simply by reference to the Appendix and to the page number if required (e.g., Appendix A at 1a).

2004, Judge Werlein again remanded the case. In doing so, he noted that neither Crystal Power nor any of the Defendants were parties to the arbitration agreements cited by the Defendants as a basis for their removal. He therefore concluded that the case did not relate to an arbitration agreement and that he did not have subject-matter jurisdiction over the case. (Appendix F at 34a-36a).

Petitioners appealed the second remand order and also filed an emergency motion to stay Judge Werlein's second order of remand. The Fifth Circuit court of appeals dismissed the appeal for lack of jurisdiction on November 10, 2004 and denied the Petitioners' Motion for Rehearing by Order dated January 7, 2005. Petitioners then sought a stay of the mandate in this Court. After that stay was denied on January 19, 2005, Petitioners filed their Petition for Writ of Certiorari challenging both appellate dismissals on March 2, 2005.

ARGUMENT

A. SECTION 1447(d) PROHIBITS THE APPEAL OF REMAND ORDERS IN SECTION 205 CASES

In *Things Remembered Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) this Court made it clear that section 1447(d) barred the appeal of a remand order in cases removed under any statute. Thus, this Court has indicated that the bar to appellate review applies in all cases in the absence of a clear statutory command to the contrary. *Id.* In this case the Fifth Circuit court of appeals applied the bar of section 1447(d) and dismissed both of Defendants' appeals from the orders remanding this case to state court. In dismissing these appeals, the court was acting in

accordance with every other court of appeals decision which had considered the applicability of section 1447(d) to remand orders in cases removed pursuant to 9 U.S.C. §205. In each of these cases the court held that section 1447(d) prohibited the appeal of remand orders in a section 205 case. *Dahiya v. Talmidge Int'l Ltd,* 371 F.3d 207, 208 (5th Cir. 2004) (holding that the "procedure for removal" language in section 205 includes section 1447(d) which bars appellate review of remand orders); *Beiser v. Weyler,* 284 F.3d 665, 672 (5th Cir. 2002) (holding that a remand for lack of subject matter jurisdiction in a section 205 cases is not appealable); *Transit Cas. Co. v. Certain Underwriters,* 119 F.3d 619, 624-25 (8th Cir. 1997) (holding that the phrase "otherwise provided by law" in section 205 refers to 28 U.S.C. §§1441-52); *Severonickel v. Gaston Reymenants,* 115 F.3d 265, 266 (4th Cir. 1997) (holding in a section 205 case that appellate review of an order of remand was barred by section 1447); *LaFarge Coppee v. Venezolana de Cementos S.A.C.A.*, 31 F.3d 70, 71 (2nd Cir. 1994) (holding that section 205 renders applicable the remand provisions of 28 U.S.C. §1447(c)(d)); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir. 1992) (holding section 205 incorporates the procedures set forth in 28 U.S.C. §§1441-52 and in particular section 1447(d), which blocks appellate review of remand orders). Thus, the issue in this case is not one on which the circuits have differed. To the contrary, they have uniformly applied section 1447(d) to bar appeals of jurisdictional remand orders in section 205 cases.

Despite the teaching of these cases, Petitioners argue that the Fifth Circuit misconstrued section 205 and that the phrase "procedure for removal of causes otherwise

provided by law," incorporates only 28 U.S.C. §1446 and by inference excludes not only the provisions of section 1447(d) but also "any other statute in [28 U.S.C] Ch. 89." (Petition for Cert. at 15). Petitioners argument is incorrect for two reasons: First, it ignores this court's holding in *Things Remembered Inc.* which requires the application of section 1447(d) to removals under any statute unless Congress gives a clear statutory command to the contrary. Second, Petitioners' proposed construction is patently incoherent because it makes inapplicable to section 205 cases all procedures Congress put in place for the handling of removed cases after they have been removed. In other words, Petitioners are asking this Court to assume that Congress created a right of removal in arbitration cases but eliminated all statutory provisions for the handling of those cases after removal. Because Petitioners' construction of section 205 violates *Things Remembered* and unnecessarily creates a species of removed cases not governed by any post-removal procedures, the Court should reject it and deny the Petition for writ of certiorari.

1. Petitioners' Construction of Section 205 violates *Things Remembered.*

In *Things Remembered Inc.,* this Court held that section 1447(d) would bar the appeal of a remand order in cases removed under any statute unless Congress gave a clear statutory command otherwise. *Things Remembered Inc.*, 516 U.S. at 128. The basis of this Court's holding was its assumption that Congress knew that section 1447(d) barred appeals of remand orders and that Congress would expressly remove that bar if it intended to allow for the appeal of a remand. *Id.*

This Court's assumption aligns with the practice of Congress to expressly allow for the appeal of remand orders in certain cases. For example, section 1447(d) expressly excepts from its application cases removed pursuant to 28 U.S.C. §1443. In delineating this exception, Congress gave a clear statutory directive that "an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. §1447(d). Congress has acted with equal clarity in other circumstances. For example in 12 U.S.C. §1441a(*l*)(3), Congress gave the Resolution Trust Corporation the right to remove any case to which it was a party. Then, in section 1441a(*l*)(3)(C), Congress stated that "The Corporation may appeal any order of remand entered by a United States district court." Congress also clearly expressed its intent to allow the appeal of remand orders in cases involving the Federal Deposit Insurance Corporation. Thus, 12 U.S.C. §1819(b)(2)(B) gives the FDIC the right to remove a case, and section 1819(b)(2)(C) expressly states that "The Corporation may appeal any order of remand entered by any United States district court."

The clarity with which these statutes grant an appeal of a remand order stands in stark contrast to the murkiness of Petitioners' construction of section 205. Petitioners argue that this court should infer that Congress by using the term "procedure for removal" in section 205 intended to incorporate only the provisions of 28 U.S.C. §1446 which is entitled "Procedure for Removal" and not any other section of Ch. 89 of Title 28. From that construction they ask the Court to infer that Congress intentionally

intended to make non-applicable section 1447(d)'s appellate bar as well as every other removal and post removal procedure not included in section 1446.

The very fact that the Petitioners are asking the Court to make this inference reveals that Congress has not clearly commanded that section 1447(d) should not apply to cases removed pursuant to section 205. If Congress had made an express command, then the statute would be clear and no inference would be necessary. Further, Petitioner's proposed construction runs contrary to the phrase "otherwise provide by law" which indicates a broad incorporation of removal procedures rather than only those delineated in section 1446. If Congress intended to incorporate only section 1446, it could have done so by expressly referring to section 1446 or by at least using more restrictive language.[2] Instead, the statute incorporates the "procedure for removal of causes otherwise provided by law," thus indicating an intention for the courts to apply all removal procedures except those expressly excepted by section 205.

In addition, Petitioners fail to recognize the similarity in language between section 205's phrase "procedure for removal of causes otherwise provided by law" and the phrase "Removal of Cases from State Courts" which is the title Congress gave to Chapter 89 of Title 28 which contains all of the removal and post removal procedures to be applied in removed cases. Indeed, it is certainly reasonable

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[2] Indeed, Congress in other legislation has referred specifically to section 1446 when it intends to incorporate only that section. 22 U.S.C. §§290i-7, 290k-9 and 290m (each section allowing a specified defendant to remove a case by "following the procedure for removal provided in section 1446 of Title 28.")

to construe the phrase "procedure for removal of causes" in section 205 as referring to the whole of Ch. 89 which is entitled "District Courts – Removal of Cases from State Courts" This construction finds support in the legislative history for Title 28. In House of Representatives Report No. 308 entitled "Revision of Title 28, United States Code," the House Judiciary Committee used the phrase "procedure for removal of causes" to refer to sections 1441-1450 of Title 28. H.R. REP. NO. 308 (1947) *reprinted in* 28 U.S.C.A. §§2461-End, Legislative History, pp. 701, 707 (1994). Since section 205 uses the exact same phraseology, it should also be construed to refer to all of Ch. 89 rather than to only section 1446.

In sum, this Court has made clear that section 1447(d) bars appeals from remand orders in cases removed under any statute unless Congress clearly expresses its intent that such appeals be allowed. Section 205 does not contain a clear command to allow remand orders in section 205 cases to be appealed. Indeed, it makes no express reference to the appeal of remand orders, stating only that "the procedure for removal of causes otherwise provided by law" should apply to section 205 removals. Since the procedure for removal can be reasonably construed to include the appellate bar in section 1447(d), and since Congress has not clearly allowed for appeals from remand orders in section 205 cases, this Court should deny the petition for certiorari and allow to stand the uniform holding of the courts of appeals that section 205 incorporates 28 U.S.C. §1447(d) which prohibits appellate review of remand orders. *Dahiya,* 371 F.3d at 208 (5th Cir. 2004); *Beiser,* 284 F.3d at 672 (5th Cir. 2002); *Transit Cas. Co.,* 119 F.3d at 624-25 (8th Cir. 1997); *Severonickel,* 115 F.3d at 266 (4th Cir. 1997); *LaFarge Coppee,* 31 F.3d at 71 (2nd

Cir. 1994); *In re Amoco Petroleum Additives Co.*, 964 F.2d at 712 (7th Cir. 1992).

2. Petitioner's Construction of Section 205 Eliminates All Procedural Guidelines for Handling Section 205 Cases.

Petitioners ask the court to construe the phrase "procedure for removal of causes otherwise provided by law" as incorporating only 28 U.S.C. §1446 and no other statute in chapter 89 of Title 28. (Cert. Petition 15). Petitioners must make this argument because they know incorporation of any other provision in Ch. 89 would also require incorporation of section 1447(d) which bars their appeal. As a result, Petitioners are left to argue that Congress created a right of removal under section 205 and at the same time and by inference negated the applicability of all non-section 1446 procedures to cases removed under section 205.

If Petitioners were correct, no case removed pursuant to section 205 could be remanded because remand is governed by section 1447, the applicability of which Petitioners disavow. Similarly the procedures set out in section 1447(a) & (b), which empower the district court to bring before it all proper parties and to require the removing party to file with the clerk records of state court proceedings, would not apply in cases removed pursuant to section 205, leaving district courts without authority to ensure that all the parties as well as a complete record were before the court. Petitioners' construction of section 205 would also negate the applicability of 28 U.S.C. §§1448 and 1450 in section 205 cases. These provisions govern service of process in removed cases and the continued validity of writs, sequestrations, bonds and injunctions after removal

of the case. They provide an orderly process for bringing all of the parties and issues in the state court proceeding before the federal court after a case has been removed; however, according to Petitioners, they would not apply in cases removed pursuant to section 205.

Petitioners ask the Court to construe the phrase in section 205 that "The procedure for removal of causes otherwise provided by law shall apply" to mean that the procedure for removal set out in 28 U.S.C. §1446 shall apply to cases removed under section 205 but that all other procedures contained in chapter 89 of Title 28 are expressly inapplicable to such cases. Such a construction would require the courts to develop a series of *ad hoc* federal common law procedures for handling section 205 cases. Nevertheless, Petitioners argue that this Court should hold that Congress intended to substitute a series of *ad hoc* court-created procedures for the statutorily enacted procedures included within chapter 89 of Title 28. Such a construction directly contravenes the plain meaning of the phrase "The procedure for removal of causes otherwise provided by law shall apply" and would create confusion where clarity was intended. Since the defendant's proposed construction of section 205 would leave plaintiffs without the remedy of remand in section 205 cases and unnecessarily negate the use other statutory procedures in cases removed under section 205, it should be rejected and the petition for writ of certiorari be denied.

B. THE DISTRICT COURT'S SECOND ORDER OF REMAND WAS BASED ON A LACK OF SUBJECT MATTER JURISDICTION AND IS THEREFORE NOT REVIEWABLE.

Petitioners next argue that Judge Werlein's second order of remand is reviewable by appeal because it is based on a "non-section 1447(c) ground." Acceptance of this argument requires the Court to steadfastly ignore both the language of section 1447(c) and Judge Werlein's second remand order.

Section 1447(c) requires a district court to remand a case "if at any time before final judgment it appears that the district court lacks subject-matter jurisdiction." In his order of remand, Judge Werlein stated: "Because neither the allegations in Defendants' Notice of Removal nor the allegations in Crystal's state court pleadings support jurisdiction under §205, Plaintiff's Motion for Remand Must be Granted." (Appendix F at 36a). Judge Werlein's order expressly acknowledges his lack of subject matter jurisdiction and remands the case on that basis. Since the lack of subject-matter jurisdiction is a basis for remand under section 1447(c), the remand order is not reviewable.

Despite the clarity of Judge Werlein's order, Petitioners contend that the remand was not based on a lack of subject-matter jurisdiction but was instead improperly based on the merits of petitioners' case and thus reviewable. Specifically, they complain that Judge Werlein's determination that the arbitration agreements cited by defendants did not provide a defense in this case because the litigants were not parties to those agreements was a merits based determination and thus subject to review. This argument ignores jurisdictional inquiry required by section 205.

Section 205 conveys federal jurisdiction in actions where the subject matter "relates to an arbitration agreement or award falling under the Convention." In order to determine whether he had jurisdiction, Judge Werlein had to determine whether this case was related to a Convention based arbitration agreement or award. In order to make this jurisdictional determination, Judge Werlein was required to determine whether the arbitration agreements cited by the defendants were related to this case. He found no relationship based on the fact that the parties to this case were not parties to the arbitration agreements or award. Thus, Judge Werlein's determination that the agreements did not provide a defense was necessary in order to determine his own jurisdiction and naturally resulted in a remand of this case for lack of subject-matter jurisdiction. Since Judge Werlein's second remand order was based on a lack of subject-matter jurisdiction, it should be considered a section 1447(c) remand and is not reviewable by appeal or otherwise under section 1447(d).

C. THE REMAND ORDERS WERE NOT REVIEWABLE UNDER THE COLLATERAL ORDER DOCTRINE.

Petitioners also argue that the remand orders are appealable under the collateral order doctrine. Specifically, they contend that the collateral order doctrine allowed them to appeal from Judge Werlein's determinations that (1) the final award and arbitration agreements do not provide a defense to Crystal Power's claims; (2) that non signatories cannot enforce an arbitration agreement; and (3) Crystal Power's claims are not dependent on any issues that are subject to the agreement containing the arbitration provision. (Petition for Cert. at 26).

In *Doleac v. Michalson*, 263 F.3d 470 (5th Cir. 2001), the Fifth Circuit court of appeals held that courts dealing with the reviewability of a remand order under the collateral order doctrine must engage in a two-step analysis. First, the court must determine whether the order to be reviewed on appeal is sufficiently separable from the remand order so as not to be barred from appeal by section 1447(d). If the order is separable, then the court must determine whether it is appealable as a final order or under the collateral order exception to the requirement of judgment finality. *Id.* at 478, 485.

1. The District Court's Challenged Determinations Were Not Separable From the Order of Remand.

To be separable, an order must precede the remand order in logic and in fact and be conclusive. *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 776 (5th Cir. 2001); *Doleac*, 264 F.3d at 279. Judge Werlein's challenged determinations are not separable from the order of remand under either portion of the *Arnold* test.

a. The Arbitration Determinations Did Not Precede the Remand In Fact.

In *Doleac*, the Fifth Circuit court of appeals suggested that a district court's determination of an issue made for the purposes of ascertaining its own subject matter jurisdiction does not precede a remand in fact and therefore is not separate. *Doleac*, 264 F.3d 470, 485 (5th Cir. 2001). The Third Circuit court of appeals reached the same conclusion in *Powers v. Southland Corp.*, 4 F.3d 223, 228 (3rd Cir. 1993). Using this test, it is clear that Judge

Werlein's challenged determinations are not separable from his remand order. These determinations were made solely for the purposes of determining whether the court had subject matter jurisdiction. Thus, they cannot be said to be separable from his remand order.

b. Judge Werlein's Challenged Determinations Are Not Conclusive.

The jurisdictional nature of Judge Werlein's determinations also defeat the "conclusiveness" prong of the "separable" analysis. In *Linton v. Airbus Industrie*, 30 F.3d 592, 597 (5th Cir. 1994), the court held that a determination that defendants were not instrumentalities of foreign state for purposes of the Foreign Sovereign Immunities Act was a jurisdictional finding resulting in the remand of the case to state court and was therefore not conclusive. *Linton*, 30 F.3d at 597. Under this rationale, Judge Werlein's challenged rulings regarding the relationship between this case and the arbitration agreements made the basis of the removal are not conclusive. These holdings were made only for jurisdictional purposes and therefore have no preclusive effect in state court. *Id. See also, Doleac*, 264 F.3d at 487 (suggesting that a federal court decision that is irrelevant to the state court's adjudication should not be considered as conclusive and thus separable). Since Judge Werlein's challenged rulings did not in fact precede his remand order and were not conclusive, they are not separable from that remand order. Section 1447(d) therefore bars review of those determinations.

2. Judge Werlein's Determinations Are Not Appealable Collateral Orders.

Since Judge Werlein's challenged holdings are not separable from his order of remand, they cannot be reviewed regardless of whether they were collateral orders. *Doleac*, 263 F.3d at 478 and 485; *Arnold*, 277 F.3d at 776. However, even if Judge Werlein's determinations regarding the relationship between this case and the arbitration agreements made the basis of Petitioners' removal were separable, they are nevertheless not reviewable collateral orders.

An appealable collateral order is "an order that conclusively resolves an issue separate from the merits of the controversy, is effectively unreviewable on appeal from the final judgment, and is too important to be denied review." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996); *Arnold*, 277 F.3d at 776-77. Thus, the collateral order doctrine is recognized to be "extremely limited in application." *Doleac*, 264 F.3d at 491.

Petitioners argue that Judge Werelein's rulings should be reviewable because they have "powerful relevance beyond determining jurisdiction in that [they] cut Petitioners off from their right to have a federal forum determine whether an arbitrator would resolve their dispute." (Petition for Cert. at 27). If this argument were correct, however, the common law collateral order exception would swallow the congressionally mandated rule that appeals from jurisdictional remands are not reviewable. 28 U.S.C. §1447(d). All remand orders have the effect of depriving the removing party of his claimed right to a federal forum. If that were enough to make the remand reviewable, then section 1447(d) which prohibits such review would be meaningless.

Further, in *Doleac* the Fifth Circuit held that a defendant's right to a federal forum is not so significant that it merits appellate review and on that basis refused to apply the collateral order doctrine to allow review in that case. *Doleac*, 264 F.3d at 491. Thus, the Defendants' loss of their purported right to a federal appellate forum cannot justify appellate review under the collateral order analysis.

CONCLUSION

The Fifth Circuit's dismissal of Petitioners' multiple appeals from the remand orders in this case correctly applied 9 U.S.C. §205 and 28 U.S.C. §1447(d) which together prohibit appeals from remand orders in cases removed pursuant to section 205. The dismissals were in accord not only with the plain language of these statutes, but with every other court of appeals decision which has considered the issue.

Since the Petitioners are merely asking the Court to determine an issue which has already been determined correctly by many of the federal courts of appeals, this Court should deny their petition for certiorari.

Respectfully submitted,

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